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No. 88-1595 (10)
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

KAISER ALUMINUM & CHEMICAL CORPORATION and
KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners and Cross-Respondents,

v.

JOSEPH A. BONJORNO, LORRAINE KERR
(EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.),
and BARBARA K. CLISBY,
Respondents and Cross-Petitioners.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

OPPOSITION OF PETITIONERS TO RESPONDENTS' MOTION TO OPEN ORAL ARGUMENT AND TO SUBMIT "SUMMARY OUTLINE OF ISSUES AND POSITION OF CROSS-PETITIONERS"

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Petitioners Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser") oppose the motion filed by respondents and cross-petitioners Joseph A. Bonjorno, Lorraine Kerr (Executrix of the Will of George M. Kerr, Jr.), and Barbara K. Clisby ("respondents") which they have entitled Motion of Cross-Petitioners to Open Oral Argument And In Support Thereof To Present To The Court A Summary Outline Of Issues and Their Position For Use In Determining The Order Of Oral Argument, Under Supreme

Court Rule 38, And To Facilitate Questioning By The Court At Oral Argument.

Putting aside the initial question of whether the Rules of this Court allow cross-petitioners to file an application such as this, Kaiser's opposition to the motion is two-fold. First, Rule 38 should not be construed in this case to permit respondents to open oral argument. Second, respondents' "motion" is in fact an unauthorized supplemental brief which should be rejected as contrary to the Rules of this Court.

A. This Court Should Not Permit Respondents To Open Oral Argument.

Supreme Court Rule 38 declares the general rule that the "*petitioner is entitled to open and conclude the argument.*" (Emphasis added). The Rule further provides that in the event there is a cross-writ of certiorari, "the Court will advise the parties which one is to open and close." *Id.* Kaiser urges this Court to apply the general rule here and to permit Kaiser to open and close oral argument.

Respondents assert that the issue presented in their Cross-Petition is "the ultimate issue that this Court must address. . . ." Motion at 2, ¶ 3. However, this so-called ultimate issue was presented to this Court in a *conditional cross-petition* in which respondents sought review of the Court of Appeals' decision *only if* Kaiser's initial Petition was granted. If the issue presented in the Cross-Petition was not important enough to warrant an *unconditional* cross-petition, it is obviously not the "ultimate issue that this Court must address," as cross-petitioners suggest in their motion. On the contrary, the primary issues before this Court are the propriety of retroactive application of amended §1961 and whether postjudgment interest may be awarded from a date prior to entry of judgment. These issues were presented in Kaiser's Petition and briefs. Moreover, as the *only* party to file an unconditional petition, Kaiser should be permitted to open and close oral argument, pursuant to the first sentence of Rule 38.

B. This Court Should Not Consider Respondents' Outline.

Respondents concede that this Court has already received 324 pages of briefs addressed to the issues in the Petition and Cross-Petition. Nevertheless, respondents now seek to submit additional argument in a 12-page document they have appended to their motion, entitled "Summary Outline Of Issues And Position Of Cross-Petitioners."

Respondents' "Summary" should be disregarded by this Court as it is simply a disguised supplemental brief which does not conform to the Rules. The explicit terms of Supreme Court Rule 35.5 provide that a party may submit a supplemental brief *only* when it "desires to present late authorities, newly-enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief." The "Summary" submitted by respondents cites to no "late authorities," refers to no "newly-enacted legislation," and presents no "intervening matters that were not available in time to have been included" in respondents' briefs. Indeed, respondents themselves state that the "Summary Outline contains no discussion, arguments or citation of cases not contained in Cross-Petitioners' three briefs filed with this Court." Motion, at 4, ¶ 7. The "Summary" is simply an unnecessary rehash of all respondents' prior briefs and should therefore be rejected.

Respectfully submitted,

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